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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 295

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE I. WITKOVICH, ALSO KNOWN AS JURI ISADOR WITKOVICH

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

REPLY BRIEF FOR THE UNITED STATES

The appellee, choosing to rely entirely on the opinion of the court below (Br. 8–10), has presented no argument to support the construction of the statute as limiting the supervisory power of the Attorney General to insuring the availability of the alien for deportation. We have discussed that holding in our main brief (Gov't. Br. 14–30). The appellee does urge that the statute is unconstitutional in a number of respects and this brief will be devoted to replying to those arguments.

I. There has been no infringement of the right of free speech under the First Amendment

The contention that questioning about membership in, and support of, the Communist Party is prohibited by the First Amendment has been too often rejected to require discussion now. *E. g., American Communications Association* v. *Douds,* 339 U. S. 382; *Adler* v. *Board of Education,* 342 U. S. 485; *Barsky* v. *United States;* 167 F. 2d 241 (C. A. D. C.), certiorari denied, 334 U. S. 843.

The appellee, however, argues that the scope of questioning permitted the Attorney General is not limited by the statute and that an unrestricted power to require answers to any question, however irrelevant, is an infringement of free speech (Br. 10–14). Whether or not this argument would be sound if the Attorney General had been granted unrestricted scope to his questioning, such is not the case. Just as in *Carlson* v. *Landon,* 342 U. S. 524, where the power to detain was construed in the framework of the legislation, so here the right to question is to be read as limited to questions relevant to the purposes of the supervisory power. This Court, in *Carlson* v. *Landon,* found that, in connection with deportation proceedings based upon Communist activity, the authority of the Attorney General to detain gained definiteness from the policy of the statute "to guard against Communist activities pending deportation hearings." 342 U. S. 524, at 544. So, here, the right to question is not unlimited but is determined by the framework of the statute and the nature of the grounds for deportation in the particular case.

The final order for deportation was not introduced in evidence in this case and appellee argues that we may not refer the Court to its terms (Br. 1–2). There was no opportunity to make formal proof of the terms of the order since this case arose on a motion to dismiss the indictment. However, it is clear that the court below could, and this Court can, take judicial notice of the final order of the Board of Immigration Appeals since it is a public official document. *United States* v. *Teschmaker,* 22 How. 392, 405; *Coffee* v. *Groover,* 123 U. S. 1, 11; *Jones* v. *United States,* 137 U. S. 202, 214; *Knight* v. *United States Land Association,* 142 U. S. 161, 169; *New York Indians* v. *United States,* 170 U. S. 1, 32; *Caha* v. *United States,* 152 U. S. 211; *Dennis* v. *United States,* 339 U. S. 162. For the convenience of the Court we have printed the Board's opinion as an Appendix to this brief, *infra,* pp. 13–14. It is clear from that opinion that deportation was based on the specific finding that the appellee was a voluntary member of the Communist Party from at least 1940 to at least 1949 (*infra,* p. 14). Since that was the basis of the order, the supervisory order may, under the reasoning of *Carlson* v. *Landon,* relate to the possible continuation of that activity, and the questions to be asked by the Attorney General are permissible if they are pertinent in that respect.

II. The statute is not void on the basis that it is vague and indefinite nor as an unlawful delegation of legislative power

As a variation on the theme that the unlimited power of the Attorney General is in violation of the First Amendment, appellee also argues that the statute

is vague and indefinite (Br. 14–19) and is an unlawful delegation of legislative authority (Br. 42–44). In these forms, the argument is again dependent on taking the words of the statute out of context and assuming that the powers of the Attorney General are in no way limited by the purpose of the legislation and the nature of the deportation order. But this Court has frequently held that in order to avoid a serious question of constitutionality on the basis of vagueness, the words of a statute should be given a restricted reading drawn from the framework of the entire law. *Screws* v. *United States,* 325 U. S. 91; *United States* v. *Harriss,* 347 U. S. 612, 618.

And this Court considered a similar argument on the issue of an unlawful delegation of legislative authority in *Carlson* v. *Landon,* 342 U. S. 524, and rejected it, stating at pages 542–544:

> * * * We consider first the objection to the alleged unbridled delegation of legislative power in that the Attorney General is left without standards to determine when to admit to bail and when to detain. * * *
>
> * * * The legislative judgment of evils calling for the 1950 amendments to deportation legislation is set out in the introductory sections of the Subversive Activities Control Act. So far as pertinent to these proceedings, the new legislation was designed to eliminate the subversive activities of resident aliens who seek to inculcate the doctrine of force and violence into the political philosophy of the American people. To this end provision was made for the detention and deportation of cer-

tain noncitizens, including members of the Communist Party. When in the judgment of the Attorney General an alien Communist may so conduct himself pending deportation hearings as to aid in carrying out the objectives of the world communist movement, that alien may be detained. Compare *Yakus* v. *United States*, 321 U. S. 414, and *Bowles* v. *Willingham*, 321 U. S. 503, 515. This is a permissible delegation of legislative power because the executive judgment is limited by adequate standards. The authority to detain without bail is to be exercised within the framework of the Subversive Activities Control Act *to guard against Communist activities pending deportation hearings.* * * * [Emphasis added.]

III. Appellee is not unconstitutionally deprived of a jury trial

The appellee claims an absence of procedural due process, as well as a violation of the right to trial by jury under the Sixth Amendment, on the ground that the administrative finding of deportability may be used against him at trial without his having a jury determination of the facts underlying that finding (Br. 19–22). This misconceives the terms of the crime as established by Congress. Section 242 (d) of the Immigration and Nationality Act of 1952 does not make it a crime to be deportable; it provides that certain willful conduct by an alien after he has been ordered deported shall be a crime.

The law is replete with instances in which a status or duty is established administratively, to be followed by criminal consequences in the event of subsequent acts or omissions by the person affected. Such legis-

lation is not to be invalidated upon the theory that the crimes peculiarly associated with the specific status or duties may later indirectly rest upon the original administrative determination of that status. Thus, a person denied a driver's license could not lawfully take it into his own hands to drive without a license because the denial was by an administrative body.

A significant analogy is found in the selective service legislation. The hundreds of thousands of draft classifications have not been established by jury trials; yet refusals to comply with requirements of the classifications have been made crimes by statute, and the validity of the legislation has been upheld. As observed by this Court in *Cox* v. *United States*, 332 U. S. 442, 453:

> * * * The concept of a jury passing independently on an issue previously determined by an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order. * * *

Freight tariffs or price controls established by administrative proceedings have long been upheld. In *Yakus* v. *United States*, 321 U. S. 414, 444–445, this Court stated:

> * * * [W]e are pointed to no principle of law or provision of the Constitution which * * * precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of vio-

lation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue.

* * * * * * *

For more than fifty years it has been a penal offense for shippers and interstate rail carriers to fail to observe the duly filed tariffs fixing freight rates—including, since 1906, rates prescribed by the Commission—even though the validity of those rates is open to attack only in a separate administrative proceeding before the Interstate Commerce Commission. 49 U. S. C. §§ 6 (7), 10 (1); *Armour Packing Co.* v. *United States,* 209 U. S. 56, 81; *United States* v. *Adams Express Co.,* 229 U. S. 381, 388. It is no defense to a prosecution for departure from a rate fixed by the filed tariffs that the rate is unreasonable or otherwise unlawful, where its infirmity has not first been established by an independent proceeding before the Interstate Commerce Commission, and the denial of the defense in such a case does not violate any provision of the Constitution. [citing decisions] * * *

In short, there is no constitutional objection to the imposition of duties or consequences in connection with administrative findings.

Wong Wing v. *United States,* 163 U. S. 228, relied upon by appellee (Br. 20), affords enlightening contrast rather than support for appellee's position. Under the statute involved in *Wong Wing* the question of whether an alien wilfully violated regulations was never to reach a court, but was to be decided entirely by a commissioner. The mere entry of an or-

der of unlawful residence resulted, under the statute, in virtually automatic and immediate imposition of imprisonment and "infamous punishment at hard labor" (163 U. S. at 237). There is a clear and fundamental difference between a provision under which an administrative finding automatically imposes punishment, and provisions, as in the instant statute, granting authority for the administrative determination of status and the imposition of supervisory requirements relevant to that status, and providing for criminal punishment only upon judgment in a criminal trial that the supervisory requirements have been wilfully violated.[1]

IV. The statute is not a bill of attainder nor an ex post facto law

The argument that the statute constitutes a bill of attainder and an *ex post facto* law (Br. 22–23) seeks to relate the criminal penalties imposed upon conduct of deportable aliens back to the deportation order, and to challenge the constitutionality of Section 241 of the Immigration and Nationality Act, 66 Stat. 204, 8

[1] There is not involved here the problem, injected by appellee (Br. 19–22), which is raised in the dissenting opinion in *United States* v. *Spector*, 343 U. S. 169, 174–180, of whether, in a criminal prosecution for violation of the conditions of supervision, appellee would have the right to contest the validity of the deportation order. Under the Selective Service law the legality of the draft classification is passed on by the court, not the jury, in the criminal case. That problem is to be met when and if it arises. The only issue is whether, on the basis of a finding of deportability, appellee can be subject to reasonable regulation based on the status of deportability. Under the decisions cited above, he is subject to such regulation, even though the status of deportability was administratively determined.

U. S. C. 1251, which designates membership in the Communist Party as a basis of deportation. It is based on the theory which we have shown to be erroneous that the criminal penalties are imposed in punishment of the acts leading to deportation rather than—as is actually the case—for acts done in violation of the supervisory restrictions imposed after the order of deportation has become final. Moreover, to the extent that appellee does challenge the deportation order, he is merely attempting to reargue issues determined against his position in *Galvan* v. *Press*, 347 U. S. 522, *Harisiades* v. *Shaughnessy*, 342 U. S. 580, and *Marcello* v. *Bonds*, 349 U. S. 302, 314.

V. The statutory provision for supervision and questioning does not constitute a deprivation of liberty, a punishment, nor an invasion of the province of the states

The appellee presents a series of arguments, with variations in phraseology, alleging interference with liberty (Br. 23–28), punishment (Br. 35–40), and invasion of states' rights (Br. 28–34), all of which constitute in effect a due process argument that the restrictions placed on appellee by the supervisory order are a denial of rights guaranteed by the Fifth Amendment. The answer to these arguments is presented in our main brief (Govt. Br. 31–35). The supervisory power is, like the power to detain, upheld in *Carlson* v. *Landon*, 342 U. S. 524, an incident of the power to deport. Congress has decreed that aliens shall not engage in certain conduct without being subject to deportation, and this Court has upheld that as constitutional. *Galvan* v. *Press*, 347

U. S. 522. In *Carlson,* the Court upheld the right of the government physically to detain an alien to prevent his engaging in such activity. Certainly this milder form of restraint, made necessary only by the fact that an alien found to be deportable has not been removed, is *ipso facto* reasonable. It is not intended as punishment, but as a restraint on unacceptable activity. It is imposed only on those who have been administratively determined to have engaged in the activity in the past. If they do not desire to continue that type of activity there is a minimum of interference with their current mode of living. It does impose a very real restraint on an alien who desires to continue in the activity which has led to his being deported, but even in that case it is, unless he violates the order, not a punishment but a regulation of his conduct.

Actually, the type of regulation here involved differs not in kind, but only in degree, from the registration of all aliens required by Section 262 of the Immigration and Nationality Act of 1952 (8 U. S. C. 1302). That type of registration was upheld by implication in *Hines* v. *Davidowitz,* 312 U. S. 52. Since such regulation is constitutional with respect to aliens generally, the regulation here involved cannot be said to be unreasonable.

VI. The statute does not deny the appellee equal protection of the laws

The appellee's argument on equal protection (Br. 40–42) answers itself in its admission that a law is unconstitutional on that basis only when it creates

"arbitrary or unreasonable classifications and impose[s] upon such classes special burdens or obligations." It cannot be held to be arbitrary or unreasonable to treat as a class, for the purpose of supervision and reporting, aliens who have been ordered deported because they have been found to have engaged in activities which Congress believed were a peril to the safety of this country.[2]

CONCLUSION

The constitutional basis underlying this statute was stated in the government's main brief (p. 35): Appellee, who after full and fair hearings has been found undesirable as a permanent resident of the United States, is a part of a group more properly comparable to excludable aliens than to the ordinary resident alien. The limited supervisory precautions taken with respect to him, to the restricted extent that they may affect his liberty, are justified by his special position

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[2] In the last point in his brief, the appellee attacks the sufficiency of the indictment on the ground that the statute applies only to deportations under a particular statute and the indictment does not allege under what act the appellee was being deported (Br. 44–47). This argument seems to be based on a misreading of the statute, since it contains no requirement that the deportation be ordered under any particular act. See Section 242 (d), as set forth in our main brief, pp. 2–3. If the argument is to be construed as an attack on the indictment on the ground of indefiniteness, the answer is that the indictment does refer to a specific deportation order by date and thus gives the appellee all the information there is with respect to the charge against him. Cf. *Hagner* v. *United States*, 285 U. S. 427, 431; *Debrow* v. *United States*, 346 U. S. 374, 378. In any event, the sufficiency of the indictment is not an issue to be raised on an appeal to this Court under 18 U. S. C. 3731. *United States* v. *Harriss*, 347 U. S. 612, 617.

in our society and the counterbalancing necessity to prevent or at least warn of further conduct harmful to the United States.

Respectfully submitted,

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WARREN OLNEY III,
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JANUARY 1957.

APPENDIX

U. S. DEPARTMENT OF JUSTICE,
BOARD OF IMMIGRATION APPEALS

June 25, 1953.

File: E–10685—Chicago.
In re: GEORGE WITKOVICH,
in Deportation Proceedings
in Behalf of Respondent: Pearl M. Hart, Attorney,
30 North La Salle Street,
Chicago, Illinois.

CHARGES:

Warrant: Act of 1918, as amended—After entry, member of following class, set forth in Section 1 of said Act: An alien who was a member of the Communist Party of the United States.

Lodged: None.

APPLICATION: None.

DETENTION STATUS: Released on bond.

WARRANT OF ARREST SERVED: December 26, 1952.

This is an appeal from an order of the Special Inquiry Officer dated January 30, 1953, requiring respondent's deportation on the ground stated above. Notice of appeal bears the date of January 30, 1953. Subsequently, counsel addressed a motion to the District Director requesting a reopening of proceedings primarily on the ground that hearing was unfair because respondent was denied the right to counsel. This motion was decided by the Special Inquiry Officer on March 30, 1953, when he entered an order denying the motion.

The facts are set forth in great detail in the order of the Special Inquiry Officer and need not be repeated. Evidence of record establishes beyond dispute that the respondent, an alien who entered the United States in 1913, was a voluntary member of the Communist Party from at least 1940 to at least 1949. We find counsel's contention concerning the credibility of the witnesses used by the Government to be entirely without merit.

Counsel entered the case after the hearings were concluded. She contends that the respondent was denied the right to representation. The facts concerning this question are set forth in great detail on pages 1 and 2 of the Special Inquiry Officer's decision. We find this contention to be baseless. While it is true that respondent was confined during the time he was given a hearing and prior thereto, it is to us clear that he was properly advised of his right to counsel and given adequate opportunity to obtain counsel. On two occasions, hearing was recessed to enable him to obtain counsel and on the third occasion, a continuance was granted. It is noted that during the entire period respondent was incarcerated, his wife was at liberty to secure representations on his behalf. We note the efforts of the Service to obtain the services of an attorney from the Legal Aid Society for respondent when he claimed he was without sufficient fund. The opportunity given respondent to secure counsel was more than reasonable.

Contentions of counsel that hearing was in other respects violative of due process are without merit (*Barber* v. *Yanish*, 196 F. 2d 53, C. A. 9, certiorari denied 344 U. S. 817). The appeal must be dismissed.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

/s/ THOS. G. FINUCANE, *Chairman.*

U. S. GOVERNMENT PRINTING OFFICE: 1957